The Rome II Regulation[1] *and a "European Law-Enforcement Area":*[2]

Harmony and Discord in the Assessment of Damages

With particular reference to the rules governing the assessment of damages, this article explores attempts to harmonise conflict of laws principles in tort across the European Union. It introduces the historical approach taken by English law to such questions and considers the impact which the Rome II Regulation will have upon cross border personal injury claims. It suggests that attempts to impose uniformity in the "European law-enforcement area" will, at least in the short-term, create considerable uncertainty and give rise to litigation on a wide variety of ancillary issues arising out of the assessment of damages. Such uncertainty is likely to require further legislative activity, at a European level, in the future.

Bringing harmony to the conflict of laws: a succinct history

Attempts to harmonise the conflicts rules of the European Union countries can be traced back to the late 1960s. In 1968 the Member States of what was then the European Economic Community reached agreement on the terms of the Brussels

[1] European Parliament and Council Regulation (864/2007) on the Law Applicable to Non-contractual Obligations ("*Rome II*").

[2] "*To establish a genuine European law-enforcement area, the Community, under Articles 61(c) and 65 of the Treaty establishing the European Community, is to adopt measures in the field of judicial cooperation in civil matters in so far as necessary for the proper functioning of the internal market.*" Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-contractual Obligations, section 1.1.

Convention.[3] This instrument sought, by a set of self-contained rules, to identify the Member State whose Courts were to have jurisdiction over any given civil dispute with cross-border elements. The Brussels Convention was (largely) superseded (from 1 March 2001) by what is commonly referred to as "*Brussels I*".[4] Brussels I provides a cascade of jurisdictional options to Claimants in both contractual and non-contractual actions. The extent to which Brussels I extends the jurisdictional choices available to Claimants (and the interface between jurisdiction and applicable law which runs through Brussels I) is, perhaps, best illustrated by the decision of the European Court of Justice in *FBTO Schadeverzekeringen NV v Jack Odenbreit.*[5]As a result of this now much-utilised decision, Claimants injured in road traffic accidents are generally able to bring direct actions against foreign motor insurers in the Courts of their own (ie. of the injured Claimant's) domicile, rather than in the State where the motor insurer is registered. The availability of this direct cause of action has made life much easier for Claimants and those who advise them and has substantially altered the landscape for cross border road traffic accident litigation across the European Union (not least in this jurisdiction where *Odenbreit* claims are now commonplace).

While work on harmonising the rules on jurisdiction proceeded at a reasonably rapid pace, attempts at harmonising the applicable law rules progressed more slowly. In the late 1960s and early 1970s the Commission stated its ambition to codify the private international law rules on contractual and non-contractual obligations. However, by the end of the 1970s it was decided that progress was more likely to be achieved if efforts were first concentrated on the conflicts rules with respect to contract. In 1980 the Rome Convention was published and entered into force in 1991.[6] Following the Maastricht Treaty work commenced (in 1998/1999) on what would eventually become the Rome II Regulation. In late 1998 the Justice and Home Affairs Council adopted the Action Plan of the Council and Commission on the best means by which to give force to the Amsterdam Treaty's ambitions in the field of judicial and

[3] Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.
[4] Alternatively, the "*Judgments Regulation*": Council Regulation (EC) No 44/2001.
[5] (2007) Case C-463/06.
[6] See, the Contracts (Applicable Law) Act 1990.

home affairs cooperation: "*The following measures should be taken within two years after the entry into force of the* [Amsterdam] *Treaty: … b) drawing up a legal instrument on the law applicable to non-contractual obligations*." On 3 May 2002 the Commission commenced a consultation period on a draft Rome II Regulation. On 7 January 2003 a public hearing took place in Brussels. A Commission proposal followed which was explicit in its objectives:

> "*The purpose of this proposal for a regulation is to standardise the Member States' rules of conflict of laws regarding non-contractual obligations and thus extend the harmonisation of private international law in relation to civil and commercial obligations which is already well advanced in the Community with the 'Brussels I' Regulation and the Rome Convention of 1980*."[7]

In this jurisdiction, some of the more polemical reactions to the Rome II Regulation have presented it as a radical departure from the English rules which previously governed applicable law in tort (especially with respect to damages). Such reaction is understandable because, as we shall see, Rome II abruptly alters the English conflicts rules. However, it is perfectly clear that the Commission regards Rome II as a natural and predictable extension of its work on jurisdiction and on applicable law in contract; the simple act of completing an enterprise which started four decades ago. Lord Denning, making clear his own distaste for European encroachment on the common law, adopted the metaphor of a "*tidal wave*" to describe the effect of European law making on English law. It remains unclear as yet whether Rome II will leave a seed-bed or a swamp in its wake.

Applicable law and the assessment of damages before Rome II

A quick recap. Most English lawyers are reasonably familiar with sections 11 and 12 of the Private International Law (Miscellaneous Provisions) Act 1995. The general rule, pursuant to section 11, is that the law to be applied by the English Court

[7] Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-contractual Obligations, section 2.1. See also, the Rome II Regulation at recital (6): "*The proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought*."

is, "*the law of the country in which the events constituting the tort or delict in question occur*":[8] sometimes referred to in the textbooks and case law as the *lex loci delicti*. The presumption that the law of the country where the tort occurs is to be applied can be displaced under section 12 of the 1995 Act if, by comparison of the factors linking the tort with the place where the harmful events occurred, with the law of another country (say, England which I shall assume to be the law of the forum) it appears that it would be "*substantially more appropriate* [emphasis added]" to apply English law. The comparison is generally carried out with regard to (see, section 12 of the 1995 Act):

a. the parties;

b. the events;

c. the circumstances or consequences of the events.

The leading English cases on the balancing exercise required by sections 11 and 12 of the 1995 Act are *Roerig v Valiant*[9] and *Harding v Wealands*[10] – a case appealed to the House of Lords (albeit, not on the section 11/12 issue).[11] *Harding v Wealands* concerned a road traffic accident in New South Wales. The Claimant passenger was English. The Defendant, his former partner and the driver of the vehicle in which the Claimant was injured, was an Australian national. The Claimant was rendered tetraplegic as a result of injuries sustained in the road traffic accident. One of the issues between the parties concerned the law to be applied by the English Court (to the assessment of damages). The Defendant's insurers were keen to rely on certain provisions of the law of New South Wales (the *lex loci delicti*). The Court of Appeal determined that the coincidence between the nationality of the Defendant and the location of the accident meant that the general presumption (under section 11) should not be displaced.

[8] s 11(1) of the Private International Law (Miscellaneous Provisions) Act 1995.
[9] [2002] 1 WLR 2304 (CA).
[10] [2005] 1 WLR 1539 (CA)
[11] *Harding Wealands* [2007] 2 AC 1 (HL(E)).

Once the applicable law has been determined, by reference to sections 11 and 12 of the 1995 Act, it is necessary to identify the issues to which the applicable law is to be applied. With its characteristic genius for pragmatism English law evolved a distinction between substantive and procedural matters which assisted in separating those matters which were to be determined according to the applicable law and those which could be safely left to the law of the forum. Questions of liability, causation and contributory negligence[12] are treated as matters of substance which are determined by the applicable law. By contrast, matters of evidence and procedure (including costs) are, by contrast, procedural matters for the law of the forum (see, section 14(3)(b) of the Private International Law (Miscellaneous Provisions) Act 1995).

Traditionally, English law has treated the recoverability of a head of loss or damage as a substantive matter to be determined according to the applicable law. However, once it has been determined that a head of loss or damage is, according to the applicable law, recoverable, the assessment or quantification of that loss is then treated as a matter of procedure and dealt with according to the law of the forum (ie. according to English law). Accordingly, if one assumes a personal injury claim proceeding in the English Courts which arises out of a tort committed in Spain where the applicable law is Spanish law, the English lawyer instructed for the Claimant will provide a copy of his client's Schedule of Loss (which is drafted in the conventional, English manner) to a Spanish *Abogado* agent. The Spanish lawyer will then provide a brief advice identifying which of the items claimed on the Schedule are, in principle, recoverable as a matter of Spanish law. The assessment exercise (determining how much the Claimant is actually entitled to under each recoverable head of loss) is then dealt with in the ordinary manner according to English law principles.

The most recent (and most authoritative) pronouncement on where the assessment of damages is to be placed on the substantive/procedural spectrum is the decision of the House of Lords in *Harding v Wealands*.[13] As I have indicated, the Defendant's insurers were keen to rely on certain provisions of New South Wales law

[12] See, *Dawson v Broughton* (2007) (unreported decision of HHJ Holman, Manchester CC) LTL.
[13] [2007] 2 AC 1 (HL(E)).

with respect to the assessment of the Claimant's losses and, in particular, on a New South Wales statute – the Motor Accidents Compensation Act 1999 – which imposed restrictions on the amount of damages that could be recovered by the Claimant. The House of Lords held that all of the provisions of the New South Wales statute were procedural, rather than substantive, and did not, therefore, fall to be applied by the English Court which should apply the law of England (the law of the forum) to the quantification or assessment of the Claimant's losses. In the course of his speech in *Harding v Wealands* Lord Hoffmann stated as follows (recently cited with approval by Blair J in *Maher & Maher v Groupama Grand Est*):[14]

> "*In applying this distinction to actions in tort, the courts have distinguished between the kind of damage which constitutes an actionable injury and the assessment of compensation (ie. damages) for the injury which has been held to be actionable. The identification of actionable damage is an integral part of the rules which determine liability. As I have previously had occasion to say, it makes no sense simply to say that someone is liable in tort. He must be liable for something and the rules which determine what he is liable for are inseparable from the rules which determine the conduct which gives rise to liability. Thus the rules which exclude damage from the scope of liability on the grounds that it does not fall within the ambit of the liability rule or does not have the prescribed causal connection with the wrongful act, or which require that the damage should have been reasonably foreseeable, are all rules which determine whether there is liability for the damage in question. On the other hand, whether the Claimant is awarded money damages (and if so, how much) or, for example, restitution in kind, is a question of remedy.*"[15]

In a recent extra-judicial lecture Lord Mance described the House of Lords' decision in *Harding v Wealands* as a "*rebuff*" to "*an attempt by a majority in the*

[14] [2009] EWHC 38 (QB). Upheld on appeal: [2009] EWCA Civ 1191. *Maher & Maher*, both at first instance and on appeal, also determined that *Odenbreit* claims brought direct in the English Courts against a foreign domiciled insurer are tortious claims to be determined, therefore, according to the proper law of the tort, rather than claims for contractual indemnity pursuant to the insurance contract to be determined according to the law of the contract.
[15] Paragraph 24.

Court of Appeal … to redefine the traditional boundary between substance and procedure, by putting the measure of damages on the side of substance, rather than procedure."[16] Rome II succeeds where the Court of Appeal failed. Its provisions score across English law's traditional substantive/procedural divide, replacing a pragmatic local settlement with a drive towards pan-European uniformity.

Rome II and applicable law in tort: the key provisions

For an instrument with the explicit aim of introducing uniformity so as to create a "*genuine European law-enforcement area*" the Rome II Regulation is riddled with ambiguity and doubt. With the kind of complexity which may delight academics, but which drives practitioners to distraction, even its coming into force is freighted with uncertainty. Article 31 provides that, "*This Regulation shall apply to events giving rise to damage which occur after its entry into force*." The Regulation entered into force, according to the rule contained in article 254(1) of the EC Treaty, on the 20th day after its publication in the Official Journal; that is, on 20 August 2007. However, article 32 provides, "*This Regulation shall apply from 11 January 2009, except for Article 29, which shall apply from 11 July 2008*." *Dicey, Morris & Collins* suggests that articles 31 and 32 should be read together, so that Rome II will apply only in respect of events giving rise to damage which occur after 20 August 2007 where legal proceedings in respect of the same are commenced after 11 January 2009.[17] This solution requires reading the words, "… *provided that legal proceedings in respect of such events have been introduced on or after 11 January 2009*"[18] into article 31 of the Regulation (which some may object to), but does at least provide some clarity. However, the position remains far from clear and there are a variety of (academic) opinions jostling for approval by a Court. At the time of writing it remains unclear which opinion will ultimately find favour (although, for what it is worth, the author of this article prefers the *Dicey, Morris & Collins* approach).

[16] Lecture to the Pan European Organisation of Personal Injury Lawyers ("*PEOPIL*"): Malta, June 2009.
[17] Dicey, Morris & Collins, *The Conflict of Laws* (14th ed, 2007), 1st supp, para S35-168.
[18] See, R Plender & M Wilderspin, *European Private International Law of Obligations* (3rd ed, 2009), para 17-020.

Unfortunately, the uncertainty does not end with doubts about the temporal scope of the Rome II Regulation (perhaps inevitable in a legal instrument drafted by a committee after a lengthy process of negotiation and compromise and where the substantive provisions of the same are introduced by no fewer than 40 recitals). Article 4(1) of the Regulation provides as follows:

> "*Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur*."

This is clear enough and reflects the fact that the *lex loci delicti* was deployed by the conflicts rules of most Member States as the means by which to identify the applicable law.[19] It should be noted that recital (17) to the Regulation provides some additional assistance in a personal injury context that, "... *in cases of personal injury ... the country in which the damage occurs should be the country where the injury was sustained* ... ." Articles 4(2) and 4(3), however, introduce qualifications to the general rule.[20] Article 4(2), introduced by the recitals to the Rome II Regulation as an exception to the general principle contained in article 4(1), stipulates that where the alleged tortfeasor and the injured party both have their habitual residence in the same country at the time when the damage/injury occurs then the law of their country of residence shall apply (this is similar to a proposition floated, albeit *obiter*, by Waller LJ in the course of his judgment in the Court of Appeal *Harding v*

[19] See, Recital (15): "*The principle of the lex loci delicti commissi is the basic solution for non-contractual obligations in virtually all the Member States, but the practical application of the principle where the component factors of the case are spread over several countries varies*." It is striking (for an English lawyer) that legal documents emanating from the European Union continue to refer enthusiastically to the obfuscatory Latin that is now frowned on in English civil procedure; the Rome II Regulation contains multiple references to concepts like the *lex loci delicti commissi*, *culpa in contrahendo* and *acta iure imperii* (among many others).

[20] It should be noted that all of these rules can be displaced if "*The application of a provision of the law of any country specified by this Regulation* ... [is] *manifestly* [that word again] *incompatible with the public policy (ordre public) of the forum*." (Rome II Regulation, article 26). This provision is, particularly with respect to issues concerned with the assessment of damages, likely to be used only on the rarest occasions (compare with the public policy exception contained in section 2 of the Foreign Limitation Periods Act 1984). An additional general exception to the article 4 rules is that, by virtue of article 14 of Rome II, the parties have the right to choose the law to be applied to their non-contractual obligations. It seems unlikely that this will be utilised on a very frequent basis.

Wealands[21]). By contrast with the position under English law, article 4(2) applies inflexibly: where both parties habitually reside in a country other than that of the *lex loci delicti* at the time of damage then the law of that other country "*shall*" apply. It has been pointed out that the effect of this is that in article 4(2) cases is likely to be that, "*The only room for argument is over where the parties are habitually resident.*"[22] Article 4(3) is described by recital (18) to the Rome II Regulation as an "*escape clause*" from articles 4(1) and 4(2):

> "*Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs (1) and (2), the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question*."

On first reading, this provision appears to follow the pattern established by section 12 of the 1995 Act; it is difficult to imagine that English Judges will regard "*manifestly closer connection*" where found in the escape clause as a significantly different concept to "*substantially more appropriate*" where used in section 12(1). There are, however, some important differences between the position in English law (as set out in sections 11 and 12 of the 1995 Act) and article 4 of the Rome II Regulation. English law, for example, recognised that the law of different countries might, pursuant to section 12 of the 1995 Act, be applied to a particular issue (see, *Roerig v Valiant*). Rome II, by contrast, contemplates that the law of one country will be applied in each case to all aspects of a party's tortious obligations: an inflexible approach described by one distinguished English Judge as "*a pity*".[23] Article 4(3) makes use of the formula "*manifestly closer connection*" to underline the extent to which article 4(1) contains a general rule favouring application of the *lex loci delicti*:

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[21] In the course of his consideration of the balancing exercise required by sections 11 and 12 of the Private International Law (Miscellaneous Provisions) Act 1995.
[22] J Fawcett & J Carruthers, *Cheshire, North & Fawcett's Private International Law* (14th ed, 2009), p 798.
[23] Lord Mance. Lecture to the Pan European Organisation of Personal Injury Lawyers ("*PEOPIL*"): Malta, June 2009.

departures from the general rule are clearly to be regarded as exceptional. However, article 4(3) presents a pre-existing relationship – perhaps, a contract governed by a law other than that of the *lex loci delicti* – as one example of a situation in which it might be appropriate to displace the general rule.[24] The position in English law differed in that the governing law of a contract tended to be regarded as just one factor (among others) that might point to the application of section 12(1) (and displacement of the presumption that the *lex loci delicti* should be applied).

Rome II and the assessment of damages

Once article 4 has been used as the means by which to identify the applicable law, then it is necessary to identify the issues to which it is to be applied. As I have indicated, article 4 contemplates, by contrast to the pragmatic flexibility of the historical English approach, that the same applicable law will be applied to all of the issues between the parties. It is from such uniformity that a harmonised law-enforcement area is to be achieved. What room, if any, does this leave for the law of the forum? Article 1(3) of Rome II may state that the Regulation "*shall not apply to evidence and procedure*",[25] but what exactly does "*procedure*" mean in this context? Does it, for example, include or exclude the guidelines for the assessment of general damages for pain, suffering and loss of amenity promulgated by the Judicial Studies Board and the use of Ogden 6 in the calculation of multipliers for future loss?[26] Does anything now remain of the substantive/procedural distinction – particularly as it affects the recoverability and assessment of damages – with which English lawyers are familiar? It is in respect of questions of this kind that the harmonisation project expressed in the Rome II Regulation most dramatically affects the approach previously taken in English law. Article 15(c) of the Rome II Regulation states as follows:

[24] The pre-existing relationship criterion might have considerable utility in the context of package holiday claims where the consumer's contractual relationship with a tour operator is governed by a contract containing an express choice of (typically, English) law clause, but where certain additional services (eg. excursions) are then purchased by the consumer from the tour operator in resort (off-package) and where the consumer wishes to bring a claim in tort against the tour operator with respect to the provision of the same: see, for example, *Susan Parker v TUI UK Ltd* [2009] EWCA Civ 1261 LTL.

[25] Which will continue to be dealt with according to the law of the forum.

[26] One can imagine how most English Judges would answer this question.

> "*The law applicable to non-contractual obligations under this Regulation shall govern in particular: … (c) the existence, the nature and the assessment of damage or the remedy claimed*."[27]

The effect of this provision is succinctly described by the Ministry of Justice "*Guidance on the Law applicable to Non-contractual Obligations (Rome II)*":

> "*Article 15 of the Rome II Regulation defines the scope of the applicable law. It should be noted that it covers issues relating to the assessment of damages (Article 15(c)) and thereby reverses the current position in English law under which issues relating to such assessments are governed by the law of the country where the case is being determined. Under the Rome II Regulation, these issues will be governed by the law which is generally applicable*."[28]

The use of the applicable law in the assessment of damages (in addition to the recoverability of a head of loss or damage) is by no means unknown in the conflicts rules which govern other areas of law at a European level. Article 10(1)(c) of the Rome (I) Convention which governs claims in contract (see, the Contracts (Applicable Law) Act 1990 which translates Rome I into English law) provides that the law which governs the contract will also govern "… *within the limits of the powers conferred on the court by its procedural law, the consequences of breach, including the assessment of damages in so far as it is governed by rules of law* [emphasis added]". Articles 3 and 8 of the 1971 Convention on the Law Applicable to Traffic Accidents similarly provide that the applicable law (being the *lex loci delicti*) will determine the "*kinds and extent of damages*." However, the diversion of these currents to the law of tort and, therefore, the English (common law) of negligence represents a radical break with the English method of assessing damages in cross border personal injury claims. The important residual role for English law in the assessment or quantification of loss in cases where a foreign applicable law is applied by an English court has been

[27] It should be noted that article 2(3)(b) extends the reach of the Rome II Regulation to inchoate, as well as actual, damage in providing that, "*Any reference in this Regulation to: (a) an event giving rise to damage shall include events giving rise to damage that are likely to occur; and (b) damage shall include damage that is likely to occur*."
[28] Ministry of Justice, *Outline of the Main Provisions* (9 February 2008).

removed. It was not uncommon in pre-Rome II cases for foreign lawyers instructed by the parties to provide rival and conflicting opinions on the recoverability of a head of loss or damage. The resolution of such differences of opinion typically required satellite litigation and preliminary issue trials. The scope for such litigation can only be increased by the Rome II Regulation which will leave English Judges in the unenviable position of having to adjudicate on the rival claims of foreign lawyers on the quantification of an English Claimant's damages, as well as their recoverability, according to the applicable foreign law. Given the extent to which rules on the assessment of damage (for loss of amenity, for past and future loss of earnings, for gratuitous care, for loss of profit and so forth) differ across the European Union the task which may confront an English Judge used to assessing loss the English way can only be imagined.

While some have welcomed Rome II as the welcome introduction of principle to an area of English law previously based on the pragmatism expressed by the House of Lords in *Harding v Wealands*,[29] it is perfectly clear that the Regulation is itself the product of compromise. Concerns about the extent to which an accident victim might be under-compensated if damages are, as regulation 15(c) directs, assessed according to the principles prevailing in the *lex loci delicti*[30] led the Parliament to propose the addition of an article and supporting recital imposing a mandatory requirement of regard to the accident victim's actual circumstances in his or her country of domicile. The Parliament's proposal was rejected by the Council on the basis that it threatened the harmonising objectives of the Regulation as a whole. However, the convoluted legislative processes of the European Union institutions in this regard can still be traced in recital (33) which represents the compromise reached by the Council and Parliament:[31]

[29] See, for example, R Plender & M Wilderspin, *European Private International Law of Obligations* (3rd ed, 2009), para 16-056.
[30] Take, for example, an English domiciled Claimant injured in a road traffic accident in, say, Romania.
[31] An interesting summary of the legislative processes can be found in A Dickinson, *The Rome II Regulation: the Law Applicable to Non-contractual Obligations* (2008), paras 14.26 – 14.32.

"*According to the current national rules on compensation awarded to victims of road traffic accidents, when quantifying damages for personal injury in cases in which the accident takes place in a State other than that of the habitual residence of the victim, the court seised should take into account all the relevant actual circumstances of the specific victim, including in particular the actual losses and costs of after-care and medical attention*."

It has been observed that the recital, "*highlights the problem* [associated with potential under-compensation where the victim experiences or incurs the loss in the country of his own domicile], *but does little more*."[32] Recital (33) clearly works against the general objective of the Regulation and its pursuit of uniformity. It is not wholly clear how the recital is to be applied (even as a guide to the proper interpretation of regulation 15(c) – with which it appears to conflict). What will happen, for example, if damages for future gratuitous care or loss of earnings are awardable in the country of domicile of the victim of a road traffic accident, but are not awarded (or can be awarded only for a limited period or to a maximum level) by the law of the *lex loci delicti*? Clearly, while such differences relate – in a general sense – to the "*relevant actual circumstances*" of the accident victim, they might more reductively be seen as the simple product of difference between the legal systems of the two relevant countries; the kind of wrinkle which Rome II and, in particular, articles 4 and 15, was designed to iron out. It is possible that an English Judge faced with a Claimant who may otherwise be undercompensated will use recital (33) to interpret article 15(c) in such a manner that "*actual losses and costs* [emphasis added]" are compensated. This might, for example, be achieved by ensuring that past losses and costs – *actually* incurred in the country of the victim's domicile (England) at the time of assessment – are fully compensated according to conventional English law principles, while all future losses fall to be determined according to the principles prevailing in the *lex loci delicti*. Alternatively, the risk of under-compensation might justify the use of recital (33) to deploy the "*manifestly*

[32] R Plender & M Wilderspin, *European Private International Law of Obligations* (3rd ed, 2009), para 16-061.

more closely connected" escape clause in article 4(3).[33] Clearly, recital (33) must mean something and one might predict that the instinct for a pragmatic solution which is the hallmark of an English common law Judge will find an outlet in such ambiguities in the wording of the Rome II Regulation (at least in the time it takes for the European Court of Justice to enlighten us on its true meaning).

Conclusion

As this article has sought to argue, it is difficult, as a practitioner, to extend an unequivocal welcome to the coming into force of the Rome II Regulation (whenever that might have been). A degree of nostalgia for the solutions adopted by the common law to deal with the assessment of damages in cross border claims might be permissible in even the most ardent advocate of European harmonisation. Even the European Commission had some second thoughts about the compensation available to the victims of road traffic accidents injured in a country other than that of their own domicile. At the beginning of 2009 (29 January) a lengthy report was published with the slightly cumbersome title: "*Compensation of Victims of Cross Border Road Traffic Accidents in the EU: Comparison of National Practices, Analysis of Problems and Evaluation of Options for Improving the Position of Cross Border Victims.*"[34] Clearly, the study and the report which it produced reflect the same anxieties which found expression in the Parliament's insertion of recital (33) into the text of the Regulation. It remains unclear, however, why such anxiety as to the risk of under-compensation is exclusive to those injured in road traffic accidents.

The 2009 study contains lengthy descriptions of the effect of the Regulation and posits a number of possible reforms which might be made; there is not space to set out all of these, but they include the following:

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[33] An interpretation suggested by Professor Symeonides ((2008) AJCL 173), but criticised by Dickinson who regards recital (33) as simply the "*point of embarkation*" for what may become a wider review of rules across the European Union governing compensation for the victims of road traffic accident or even for subsequent reform of the Rome II rules themselves: A Dickinson, *The Rome II Regulation: the Law Applicable to Non-contractual Obligations* (2008), para 14.32.

[34] Contract ETD/2007/IM/H2/116 which can be found at http://ec.europa.eu/internal_market/insurance/docs/motor/20090129report_en.pdf

a. applying the law of the habitual residence of the victim to assess damages;

b. providing coverage through the third party liability insurance of the victim;

c. creating a European compensation fund for the victims of cross-border road traffic accidents;

d. creating European guidelines that would provide a list of recognised losses;

e. providing information to Judges so that they have accurate information in their own language about compensation levels, practices and expectations in other countries;

f. creating a European Court to have a dedicated jurisdiction over compensation issues.

Clearly, some of these solutions are more likely to find favour with European legislators and Member States than others. It seems likely that, at least with respect to cross-border road traffic accidents, the attempts made by the European Parliament to ensure appropriate compensation based on the losses incurred in the victim's country of domicile will ultimately result in further legislative reform of the Rome II Regulation (and, perhaps, a new set of rules for us to unpick). However, in the meantime and until the European Court of Justice shows an interest, English Judges are going to have to adjudicate on disputes between Claimants and insurers about the true meaning of the Rome II Regulation. There will be more litigation in this jurisdiction. It is hard to predict where this will leave the ambitions of those responsible for drafting the Rome II Regulation and their goal of harmonising the European conflicts rules for the assessment of damages in tort.

MATTHEW CHAPMAN

Barrister, 1 Chancery Lane

Chairman, Travel & Tourism Lawyers' Association